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No. 08-453

IN THE
Supreme Court of the United States

ANDREW M. CUOMO,
ATTORNEY GENERAL OF NEW YORK,
Petitioner,
v.
THE CLEARING HOUSE ASSOCIATION, L.L.C., ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE NATIONAL GOVERNORS ASSOCIATION, NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, U.S. CONFERENCE OF MAYORS, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether this Court should defer to the determination of the Office of the Comptroller of the Currency in 12 C.F.R. § 7.4000 that state enforcement of nonpreempted state laws against national banks is preempted.

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INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county, and municipal governments and officials throughout the United States.[1] Throughout this nation's history, the States have enacted and enforced laws designed to protect consumers from abusive and unfair practices by financial service providers. In particular, the States have taken a leading role in combating predatory and discriminatory lending practices. *Amici* also have a compelling interest in this Court's delineation of the constitutional limits on federal agency attempts to preempt state laws. They therefore submit this brief to assist the Court in its resolution of this case.

SUMMARY OF ARGUMENT

This case presents the question whether or to what extent courts should defer to federal administrative agencies when they determine that state or local laws should be preempted. The Office of the Comptroller of the Currency (OCC) has promulgated a regulation, 12 C.F.R. § 7.4000, which declares that it has exclusive visitorial authority with respect to the activities of national banks; that the only exceptions are visitorial functions authorized by federal law, vested in courts of justice, or exercised by Congress; and that the exception for visitorial authority exercised by courts of justice "does not grant state or other governmental authorities any right to . . . com-

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[1] The parties have consented to the filing of this *amicus* brief and their consent letters have been filed with the Clerk. This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than *amici* and their members, has made a monetary contribution to the preparation or submission of this brief.

pel compliance by a national bank with respect to any law, regarding the content or conduct of activities authorized for national banks under Federal law." *Id.* § 7.4000(b)(2).

The effect of this regulation is to declare preempted any and all efforts by state authorities, including law enforcement officials, to bring actions to enforce state law that applies to national banks and is otherwise not preempted. The court of appeals, while finding little to commend the reasoning of the OCC (Pet. App. 25a-26a), nevertheless concluded that it was required to defer to the OCC's preemption determination under the principles of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Accordingly, it enjoined the State Attorney General from bringing any enforcement action against national banks, even if federal regulators or private citizens would be allowed to invoke the same state legal authority in proceedings not initiated by state authorities.

This Court has been understandably cautious in issuing any broad pronouncements about the respective roles of courts and agencies in resolving preemption controversies. The issue is conceptually difficult, of great importance to the structure of American federalism, and presents itself in many variations, both in terms of the mechanics of different regulatory regimes and the inherently national or local nature of the underlying activity subject to regulation. Broadly speaking, three distinct questions must be answered: (1) Whether or under what circumstances action taken by a federal administrative agency can serve as the basis for a determination *by a court* that state law is preempted. (2) Whether or under what circumstances Congress may delegate

authority to a federal administrative agency to preempt state law *on the agency's own authority*. (3) Whether or under what circumstances a court faced with a question of preemption *should defer* to the judgment of a federal administrative agency that preemption is appropriate. Strictly speaking, only the third question is presented in this case, but the answer to each of the questions implicates the others.

The Court has answered the first question. Regulations and orders issued by federal administrative agencies—at least when they have the force of law—may serve as the basis of a determination by a court that state or local law is preempted. The Court has not addressed the second question, but Congress has, at least implicitly. Congress, in many different statutes, has expressly delegated authority to federal administrative agencies to preempt (or to exempt from preemption) provisions of state and local law. The Court has avoided any definitive pronouncement on the third question. The Court has never given *Chevron* deference to an agency determination that preemption is warranted, nor has it unequivocally applied the deference associated with *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), to an agency opinion that preemption is or is not appropriate. The Court has, on several occasions, indicated that agency views may be entitled to "weight," at least on select variables bearing on a preemption decision where the agency has a comparative advantage relative to a court. *See, e.g.*, *Geier v. American Honda Motor Co.*, 529 U.S. 861, 883 (2000) ("some weight"); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 496 (1996) ("substantial weight").

The key to unraveling the knot about how much deference courts should give to agency views on preemption lies in the answer to the second question, about whether Congress can delegate authority to agencies to make preemption determinations on their own authority. The text and history of the Supremacy Clause, the Necessary and Proper Clause, and considerations of comparative institutional advantage all point to the conclusion that agencies should be allowed to preempt state and local laws on their own authority only when they have been expressly delegated authority to preempt by Congress. A general grant of rulemaking authority that does not reference the power to preempt is not enough, nor is a general grant of authority to adjudicate disputes arising under federal law or to engage in oversight or investigation of private activity. Congress must specifically delegate the power to preempt.

This conclusion, and the recognition that the power to preempt is distinct from the power to interpret the meaning of federal law, answers the *Chevron* question. *Chevron* rests on the delegation of authority from Congress to an agency. An agency should be entitled to *Chevron* deference to resolve ambiguities about preemption only if Congress has expressly delegated authority to the agency to preempt. Absent such an express delegation, *Chevron* should not apply in considering an agency's determination that preemption is warranted.

Whether the *Skidmore* standard governs is a closer question. *Skidmore* allows courts to draw upon the experience of agencies in resolving questions of statutory interpretation, but it too does not focus the inquiry in precisely the right fashion. As recognized in *Medtronic* and *Geier*, and as confirmed by this

Court's recent decision in *Wyeth v. Levine*, No. 06-1249, slip op. (March 4, 2009), agencies can provide valuable input in preemption controversies, primarily by addressing questions of legislative fact about the impact of state regulation on federal regulators and the industry they are charged with regulating. It is therefore appropriate to give agency resolution of these kinds of factual issues "weight." Insofar as agencies seek merely to apply judicially-developed preemption doctrine, however, there is no basis for a court deferring "to an agency's conclusion that state law is pre-empted." *Wyeth*, slip op. at 20.

These principles yield clear conclusions as applied to this case. The OCC has not been expressly delegated authority to make preemption determinations on its own authority. Its views are therefore not entitled to *Chevron* deference. In justifying its preemption regulation, 12 C.F.R. § 7.4000, the OCC relied almost exclusively on its understanding of judicially-developed preemption doctrine. It made no relevant findings of legislative fact about the impact of state enforcement proceedings on national banks, or about the impact of such proceedings on its own visitorial functions. Its judgment is therefore entitled to no deference by this Court, which should decide the matter *de novo*.

ARGUMENT

I. THE ROLE OF AGENCIES IN PREEMPTION: CONSTITUTIONAL CONSIDERATIONS.

A. The Dual Nature of Preemption.

Preemption is often characterized as an exercise in statutory interpretation, or as resting entirely on congressional intent. *See, e.g.*, *Medtronic*, 518 U.S.

at 485-86; *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992). But as this Court recognized in *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 744 (1996), a finding of preemption requires answering two interrelated questions. First, a question of substantive interpretation: What does the federal statute or regulation at issue mean? Second, a question about the impact of the federal law, as interpreted, on state law: can federal law coexist with state law, or does federal law require that state law be displaced?

Both agencies and courts are competent to interpret federal statutes. Agencies engage in statutory and regulatory interpretation all the time in the ordinary course of discharging their delegated functions. Indeed, this Court has repeatedly recognized that agencies in certain circumstances are preferred interpreters of statutes.

The question of preemption, however, presents additional factors not present in resolving relatively straightforward questions of interpretation. Sometimes, of course, Congress expressly determines by legislation that certain state laws are preempted by federal law. *See, e.g.*, 29 U.S.C. § 1144(a) (preempting "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan"). But this Court has recognized that preemption can be implied rather than express. *See, e.g.*, *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 388 (2000) (noting that "the existence of conflict cognizable under the Supremacy Clause does not depend on express congressional recognition that federal and state law may conflict"). Especially in this latter context, resolution of the preemption question requires a determination that federal law, as inter-

preted, is in tension with state law, and that this tension is sufficiently severe to require that state authority be displaced in whole or in part in order to achieve the purposes of federal law. This inquiry into the permissible degree of tension between federal and state law is not always—or even usually—resolved by determining the meaning of the federal text.

Given the unique, twofold nature of the preemption inquiry, it would be a mistake to import the jurisprudence associated with *Chevron* and *Skidmore* wholesale into the preemption context. Deference to agency interpretations about the meaning of specialized federal law may be entirely appropriate in circumstances where deference to agencies about the need to displace state law would not be. Consideration of the constitutional framework in which preemption occurs confirms that the agency role here must be carefully circumscribed.

B. The Implications of the Supremacy Clause.

This Court has repeatedly identified the Supremacy Clause as the source of federal authority to preempt state law. *See, e.g.*, *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 540-41 (2001); *Northwest Cent. Pipeline Corp. v. State Corp. Comm'n*, 489 U.S. 493, 509 (1989); *Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 152 (1982). The text and background of the Supremacy Clause shed important light on the question of what role agencies should play in preemption.

The Supremacy Clause identifies three sources of federal law as "the supreme law of the land" and hence as potential sources of preemption of state law:

the Constitution, treaties, and the laws of the United States which shall be made "in Pursuance" of the Constitution. U.S. Const. art. VI, cl. 3. Federal agencies obviously have no authority to amend the Constitution, enter into treaties, or adopt supreme "laws" in the manner prescribed by the Constitution. Clearly, therefore, under the Supremacy Clause federal agencies have no inherent authority to declare state laws preempted.

This Court has recognized as much. In *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355 (1986), the Court rejected the FCC's contention that it could preempt a state regulation in order to "effectuate a federal policy" absent Congressional authorization. *Id*. at 385. Extensively reviewing its preemption case law, the Court said it was "both unwilling and unable" to "grant to the agency the power to override Congress" by permitting the agency "to confer power on itself." *Id*. at 374-75. Consistent with the Supremacy Clause, the only agency action that can serve as a source of preemption must be grounded in a delegation of authority from Congress.

The Supremacy Clause tells us more about the proper allocation of institutional authority in resolving preemption controversies. The full text of the Clause provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; *and the Judges in every State shall be bound thereby*, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2. (emphasis added).

The clause singles out "the Judges in every State" as being bound to enforce supreme federal law, notwithstanding any contrary provision of state law. It is not entirely clear whether the phrase "the Judges in every State" refers to state court judges, or judges throughout the United States.[2] Whatever the scope of the intended class, it is comprised solely of judges. In other words, the Supremacy Clause specifically singles out the judiciary as an institution, and assigns it the task of resolving conflicts between supreme federal law and the laws of the States. This of course strongly suggests that the judiciary was understood to be the institution to make preemption determinations.

The inference about the preferred institution drawn from the text of the Supremacy Clause is powerfully reinforced by evidence of the original understanding of that Clause and its place in the constitutional order. As multiple commentators have documented, the Constitutional Convention had before it three potential mechanisms for resolving conflicts between state and federal law: (1) the use of coercive

[2] As is well known, the Framers left the decision whether to create lower federal courts to future Congresses. *See* 1 Max Farrand, The Records of the Federal Convention 104-05, 119, 124-25 (1911). This apparently accounts for the peculiar wording of the phrase, which would include both state court judges and, potentially, federal lower court judges. For the drafting history of the phrase, including the reason for the omission of any reference to this Court, *see* Forrest McDonald, Novus Ordo Seclorum: The Intellectual Origins of the Constitution 255-56 (1985) (noting that the Supremacy Clause language was worked out before the Convention decided to create a national capital that was not part of any State where the Supreme Court would presumably sit).

force against defiant States, (2) James Madison's proposal that Congress be given an unrestricted power to "negative" any state law by federal legislation, or (3) the use of the courts to resolve competing claims grounded in different sources of law.[3] Each option corresponded to a different institutional choice. Force would be deployed by the Executive; the "negative" by the Legislature; judicial judgments by the courts. The Convention rejected the first two mechanisms in favor of the third. This important decision was embodied in the Supremacy Clause.

In short, of the institutions familiar to them, the Framers concluded that the courts were best situated to mediate between the claims of the national government and the States. Modern administrative agencies were unknown, and it is impossible to say what the Framers would have thought of relying on federal agencies to make these decisions. We do know that they were willing to trust the courts make these determinations. The Framers' decision to entrust the resolution of federal-state conflicts to the courts has been honored throughout our history. From *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), to the present, the judiciary has been the institution which has made individualized determinations of when state law must give way to superior federal

[3] *See* Jack N. Rakove, Original Meanings: Politics and Ideas in the Making of the Constitution 171-72 (1996); Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 Tex. L. Rev. 1321, 1348-72 (2001); S. Candice Hoke, *Transcending Conventional Supremacy: A Reconstruction of the Supremacy Clause*, 24 Conn. L. Rev. 829, 856-75 (1992); James S. Liebman & William F. Ryan, *"Some Effectual Power": The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 Colum. L. Rev. 696, 709-13 (1998).

law. This choice is fully reflected in the language of the Supremacy Clause, with its specific admonition to "the Judges in every State," and is entitled to the greatest respect.

C. The Necessary and Proper Clause.

The Necessary and Proper Clause, art. I, § 8, cl. 18, also bears on the analysis of institutional roles. The Necessary and Proper Clause is the source of Congress's power to enact express preemption clauses. Acting through its enumerated powers and the Necessary and Proper Clause, Congress can also adopt supreme "Laws" that delegate authority to federal agencies to act with the force of law. Agency action having the force of law, this Court has repeated ruled, can qualify as a source of a determination *by a court* that state law is preempted. The Court has so recognized both in the context of legislative agency rules and regulations, *see, e.g.*, *Geier*, 529 U.S. at 867-68; *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 674-75 (1993); *De la Cuesta*, 458 U.S. at 170; and in the context of binding agency adjudications, *see, e.g.*, *Entergy Louisiana., Inc. v. Louisiana Pub. Serv. Comm'n*, 539 U.S. 39, 49-50 (2003); *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 369-70 (1988).

If Congress can expressly preempt, and if it has the power to delegate authority to agencies to act with the force of law, then it would seem to follow that Congress can delegate authority to agencies to preempt state law on their own authority. Certainly, Congress has assumed that it has this power. Congress has enacted a number of statutes expressly authorizing agencies either to preempt state law or to

exempt state law from preemption.[4] The default position under the Supremacy Clause is that the judiciary decides preemption questions. But if Congress concludes in any particular context that an agency should be empowered to make case-by-case preemption determinations, Congress should be allowed to override the default by expressly delegating the power to preempt to an agency.

The critical question is how explicit such a delegation of authority from Congress must be in order to permit agencies to preempt (or save from preemption) on their own authority. As we have seen, agencies have no inherent power to preempt. As we have

[4] *See, e.g.*, 10 U.S.C. § 1103 (authorizing Secretary of Defense to preempt state or local laws affecting department employee benefits when he determines that preemption is "necessary to implement or administer the provisions of a contract or to achieve any other important federal interest"); 30 U.S.C. § 1254(g) (authorizing Secretary of Interior to identify state laws and regulations preempted by the Surface Mining Control and Reclamation Act); 47 U.S.C. § 253(d) (authorizing Federal Communications Commission to preempt the enforcement of state and local statutes, regulations, or legal requirements interfering with development of competitive telecommunications services); 49 U.S.C. § 5125(d) (authorizing Secretary of Transportation to determine whether particular state, local or tribal requirements respecting the transportation of hazardous materials are preempted); 49 U.S.C. § 31141 (authorizing Secretary of Transportation to review and preempt state motor vehicle safety standards under specified criteria); *cf.* 21 U.S.C. § 360k(b) (authorizing Secretary of Health and Human Services, by regulation, to exempt from preemption certain state standards for medical devices otherwise expressly preempted by statute); 47 U.S.C. § 332(3)(A) (authorizing the FCC to exempt individual States from a provision generally prohibiting States from regulating entry or rates charged by mobile telephone carriers).

also seen, the text and history of the Supremacy Clause, as well as unbroken historical practice, have assigned the preemption determination to courts. Given this constitutional background, it is appropriate to require a very explicit delegation of preemption authority from Congress before an agency is allowed to preempt state law on its own authority. A general grant of authority to make "rules and regulations" or even a specific grant of power to define specific terms or implement a statutory provision will not do. Nothing less than a clear statement that preemptive authority is being conferred upon the agency, set forth in the text of the statute itself, should suffice.

II. CONSIDERATIONS OF COMPARATIVE INSTITUTIONAL ADVANTAGE REINFORCE THE CONCLUSION THAT THE JUDICIARY IS THE PROPER INSTITUTION FOR RESOLVING PREEMPTION CONTROVERSIES.

When we move beyond considerations of constitutional text and history to take into account broader considerations of comparative institutional advantage, we also find that the judiciary is the preferred institution for resolving preemption disputes.

A. Preemption Entails the Application of Law Developed by Courts.

Given its origins in the Supremacy Clause, it is not surprising that the legal doctrine governing preemption has been developed exclusively by courts, and in particular by this Court. This carefully evolved doctrine is trans-substantive, in the sense that it applies across all fields of regulation. Administrative agencies have played no role in the devel-

opment of preemption doctrine. When agencies have offered their views about the desirability or need for preemption, they have typically framed their analysis in terms of the categories and precedents developed by the courts.[5] In other words, agencies have justified their support (or opposition) to preemption largely in terms of their reading of judicial opinions, a source of authority that agencies have no special insight in interpreting, and which the judiciary is presumably in a better position to explicate. *See Negusie v. Holder*, No. 07-499, slip op. at 10 (March 3, 2009) (holding agency not entitled to deference for a policy based on an erroneous interpretation of judicial precedent). The OCC's performance in justifying its preemptive regulation at issue in this case is consistent with this pattern. *See* Pet. App. 25a.

In addition, the decision to preempt state law presents a variety of concerns that point toward the need for a general jurisprudence of preemption which can be developed and applied in a uniform fashion. For example, this Court has recognized a presumption against preemption in areas governed by the traditional police powers of the States. *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Ideally, determining when this presumption does and does not apply should be developed in a consistent fashion across all areas of law—something that requires oversight by a single institution. Similarly, preemption doctrine requires the resolution of questions about the relationship between express and implied preemption, as well as the interpretation of certain recurring terms in express preemption

[5] *See* Nina A. Mendelson, Chevron *and Preemption*, 102 Mich. L. Rev. 737, 784-86 (2004).

clauses such as "requirements," or "relating to." *See, e.g.*, *Bates v. Dow Agrosciencs L.L.C.*, 544 U.S. 431, 443 (2005) (interpreting "requirements" in one preemption clause in light of interpretation of same word in a different preemption clause); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383-84 (1992) (interpreting "relating to" in one preemption clause to conform to interpretation of same phrase under a different preemption clause). Only the courts, and in particular this Court—which has the ability to review questions of preemption that arise both from federal and state courts—can serve the function of resolving preemption questions in a manner that maintains a unified jurisprudence of preemption sensitive to the many systemic values at stake.

B. Preemption Implicates Considerations of Federalism.

The decision to displace state law through preemption also implicates important questions of federalism. *See, e.g.*, *Medtronic*, 518 U.S. at 488 (describing preemption of state common law remedies as a "serious intrusion into state sovereignty"). Indeed, from the perspective of the States, there is little difference between a judgment that state law is preempted and a judgment that state law is unconstitutional. Both types of judgments nullify otherwise duly enacted state statutes and common law rules of decision. In so doing, both types of judgments subtract from the power the States otherwise enjoy as sovereign entities.[6]

[6] To be sure, preemption decisions can be overridden by Congress. But mobilizing Congress to overrule preemption decisions is difficult, and has rarely been successful. *See* Note, *New Evidence on the Presumption Against Preemption: An Empiri-*

Part of our received tradition is the understanding that the judiciary has unique competence to resolve questions of constitutional federalism. Thus, for example, this Court has declined to adopt interpretations of statutes that raise serious questions of constitutional federalism, *see, e.g.*, *Gregory v. Ashcroft*, 501 U.S. 452, 467 (1991), and has declined to defer to agency decisions that raise serious questions of constitutional federalism. *See, e.g.*, *Gonzales v. Oregon*, 546 U.S. 243, 275 (2006); *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 172-73 (2000). Likewise, the decision to displace state law through preemption should be informed by an understanding of which areas of regulation have been delegated to the federal government, and which have been traditionally been committed to the States, and when constitutional sensitivities would be irritated either by a determination of concurrent authority or of exclusive federal competence.

Agencies are specialized institutions, intensely focused on the details of the particular statutory regimes they are charged with administering. By design and tradition, they are not expected to ponder larger structural issues such as the relative balance of authority between the federal and state governments, the importance of preserving state autonomy, the value of allowing policy to vary in accordance

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cal Study of Congressional Responses to Supreme Court Preemption Decisions, 120 Harv. L. Rev. 1604, 1613-14 (2007). Moreover, some constitutional judgments—those based on the dormant aspect of the Commerce Clause—are also subject to revision by Congress, further revealing the close connection between preemption and constitutional invalidation.

with local conditions, or the systemic advantages of permitting state experimentation with divergent approaches to social problems. *See Gregory*, 501 U.S. at 458-59 (summarizing the systemic benefits of federalism).

C. Preemption Implicates the Scope of Agency Power.

Determining whether federal law ousts state law also implicates the scope of agency authority. *See Louisiana Pub. Serv. Comm'n*, 476 U.S. at 374-75 ("An agency may not confer power upon itself."). There are a variety of reasons why agencies are not the best monitors of the scope of their own authority. Agencies may at times engage in empire-building, or may resent implicit competition from other sources of regulatory authority like States. Analysts have long observed that agencies, particularly ones devoted to regulation of a single industry, can become too closely identified with the interests of the industry they are supposed to regulate.[7]

Congress has provided for judicial review of agency action in significant part to assure that agencies stay within the bounds of their delegated authority. This Court has been reluctant to carve out any general exception from *Chevron* for agency interpretations that transgress the bounds of agency authori-

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[7] *See, e.g.*, Marver H. Bernstein, Regulating Business by Independent Commission (1955); George J. Stigler, *The Theory of Economic Regulation*, 2 Bell J. Econ. & Mgmt. Sci. 3 (1971); Samuel P. Huntington, *The Marasmus of the ICC: The Commission, the Railroads, and the Public Interest*, 61 Yale L.J. 467 (1952); *see generally* Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 Colum. L Rev. 1 (1998) (providing an overview of theories and empirical studies).

ty, presumably because of the difficulty of distinguishing between "jurisdictional" and "non-jurisdictional" decisions. *Compare Mississippi Power & Light*, 487 U.S. at 381 (Scalia, J., concurring in the judgment) *with id.* at 386-87 (Brennan, J., dissenting). There is no need in this case, however, to tackle this more general problem. Questions about whether state law should be preempted by federal law are not handicapped by any definitional conundrum similar to the one presented by determining when an agency has acted outside its "jurisdiction." The question whether federal law preempts state law is discrete and readily differentiated from other issues of interpretation. *See* Mendelson, *supra*, 102 Mich. L. Rev. at 796 ("Preemption questions are relatively easy to distinguish, *ex ante*, from other categories of interpretative questions, so withdrawing deference on preemption issues would not introduce significant new uncertainty-based costs."). Consequently, the decision to preempt can be subject to independent judicial review, allowing courts to police the boundaries of agency authority—along this dimension at least—without calling into question the general principle of deference established by *Chevron*.

D. Preemption Determinations May Require Findings of Legislative Fact.

On one dimension, that of legislative fact-finding, agencies may be superior to courts in resolving preemption controversies. Especially where implied preemption is involved, but also in cases in which there is a dispute about the scope of an express preemption clause, it will often be important to ascertain certain facts. In particular, it will be important to understand the practical consequences of eliminating diverse sources of legal obligation. Will

this stultify experimentation with different regulatory approaches and deprive the public of adequate protection? Or is uniformity imperative in order to allow regulated entities to achieve economies of scale? These inquires require legislative fact-finding. And there is little doubt that agencies, given their ability to undertake wide-ranging investigations of industry structure and similar variables, have the capability of finding legislative facts that far surpasses courts.

The conclusion would seem to be that courts are generally superior to agencies in resolving preemption controversies, except with respect to finding legislative facts that bear on the resolution of the issue. This points toward the desirability of a standard of review that allows courts to exercise independent judgment in matters of preemption, while drawing assistance from agencies when they have undertaken to find legislative facts that shed light on the proper resolution of the matter.

III. DETERMINING THE PROPER STANDARD OF REVIEW FOR AGENCY DETERMINATIONS OF PREEMPTION.

A. *Chevron* Versus *Skidmore* Versus *De Novo*.

This Court has identified three standards of review for evaluating agency interpretations of statutes: the *Chevron* standard, the *Skidmore* standard, and *de novo* review. *See generally United States v. Mead Corp.*, 533 U.S. 218, 227-28; 234-35 (2001). *Chevron* and *Skidmore* rest on different rationales for affording deference to agency interpretations of ambiguous statutes.

"A precondition to deference under *Chevron* is a congressional delegation of administrative authority." *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990); *see Chevron*, 467 U.S. at 843-44 (deference rests on either express or implied delegation of power to agency). This delegation, in turn, creates a presumption that Congress intended the agency, rather than the courts, to exercise primary interpretational authority under the statute. *See Smiley,* 517 U.S. at 740-41 (*Chevron* rests on the "presumption" that Congress meant for the agency to "possess whatever degree of discretion" statutory ambiguity allows); *Dunn v. Commodity Futures Trading Comm'n*, 519 U.S. 465, 479 n.14 (1997) (*Chevron* deference "arises out of background assumptions of congressional intent"). *Chevron* deference, when it applies, requires that the court accept any agency interpretation that is consistent with the statute and is otherwise "permissible" or "reasonable." *Chevron*, 467 U.S. at 844 (reasonable agency interpretation is given "controlling weight").

Under *Skidmore*, in contrast, no particular delegation of power to the agency is required before it is entitled to deference. 323 U.S. at 137. Deference under *Skidmore* is grounded not in delegated power but rather on the desirability of drawing upon the "specialized experience and broader investigations and information" available to the agency, *id.* at 139, and on the need to preserve uniformity between administrative and judicial understandings of the requirements of a national program. *Id.* at 140. When *Skidmore* applies, "[t]he weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it

power to persuade, if lacking power to control." *Id.* at 140. Or, as the Court put it in *Mead*, an agency opinion evaluated under *Skidmore* receives the degree of deference appropriate to "the merit of its writer's thoroughness, logic, and expertness, its fit with prior interpretations, and any other sources of weight." 533 U.S. at 235.

De novo review generally applies when courts interpret laws that are designed to hold agency power in check, including provisions of the Constitution and of general statutes like the Administrative Procedure Act, 5 U.S.C. §§ 552 *et seq*. It also applies when courts address legal requirements as to which agencies have no claim to expertise, such as federal laws administered by the courts or by other agencies, or state law developed by state courts or agencies. *De novo* review, of course, gives no weight to the interpretational views of the agency.

B. The Limited Availability of *Chevron* in Preemption Cases.

Chevron is grounded in a delegation of authority from Congress to an agency to determine certain unresolved questions of federal law. This Court has accordingly recognized two preconditions that must be met before the *Chevron* standard applies. The two preconditions are that (1) Congress has delegated authority to the agency to act with the force of law; and (2) the agency has acted in accordance with this delegated authority in rendering its interpretation. *Gonzales*, 546 U.S. at 258-59; *National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005); *Mead*, 533 U.S. at 226-27; *Christensen v. Harris County*, 529 U.S. 576, 587 (2000).

The extension of these principles to agency determinations of preemption is straightforward. The power to preempt is distinct from the power to interpret, *see supra* Part IA, and agencies have no inherent power to preempt, it must be expressly delegated to them, *see supra* Part IC. Thus, for an agency to be eligible for *Chevron* deference for its determinations of preemption, it must show that (1) Congress has delegated authority to the agency to act with the force of law *to preempt state law*; and (2) the agency has acted in accordance with this delegated authority in determining that state law *should be preempted*. If Congress has not delegated authority to an agency to make binding determinations of preemption, or if an agency has been given such authority but does not invoke that authority in offering its judgment about the preemptive effect of federal law, then the preconditions for *Chevron* deference have not been met.

The Court's decision in *Gonzales v. Oregon* fully supports this analysis. The Court there concluded that a delegation authorizing the Attorney General to promulgate regulations relating to the registration of controlled substances did not authorize him to issue an interpretative regulation preempting a state law permitting physicians to prescribe lethal doses of medication to terminally-ill patients in certain circumstances. The Attorney General had been granted authority to make rules in certain respects, but as the Court independently construed the grant of authority, "he is not authorized to make a rule declaring illegitimate a medial standard for care and treatment of patients that is specifically authorized under state law." *Gonzales,* 546 U.S. at 258. The Court therefore declined to apply the *Chevron* stan-

dard to assess the validity of the Attorney General's preemptive regulation. *Id.* at 268-69.

Similarly, in *Adams Fruit*, 494 U.S. at 649-50, the Court declined to apply the *Chevron* standard in reviewing a Department of Labor determination of the preemptive effect of the Migrant and Seasonal Agricultural Worker Protection Act. As the Court subsequently characterized its holding, "a delegation of authority to promulgate motor vehicle '*standards*' [does] not include the authority to decide the preemptive scope of the federal statute because '[n]o such delegation regarding [the statute's] enforcement provisions is evident in the statute." *Gonzales*, 546 U.S. at 263 (quoting *Adams Fruit*, 494 U.S. at 649-50) (first interpolation added).

As previously discussed, Congress on many occasions has expressly delegated authority to agencies to preempt state law. *See supra* p. 12 & n.4. Agency determinations made under these statutes satisfy the conditions for application of the *Chevron* standard. Other agency determinations of preemption do not.

C. The *Medtronic* Standard.

If *Chevron* does not ordinarily apply to agency determinations of preemption, then is *Skidmore* the proper standard? There is something to be said for this approach. *Skidmore* instructs courts to give careful consideration to agency views, grounded in experience, about the meaning of statutes that they have developed relevant expertise in understanding. Yet *Skidmore* requires courts to follow these views only to the extent they are persuasive, thus preserving a large element of judicial authority. This strikes

a better balance in the pre-emption context than does *Chevron* deference.

Unfortunately, the *Skidmore* test does not focus on the variables in preemption where agency input would be most helpful. *Skidmore* is designed to aid the court in ascertaining the proper meaning of a statute, not to inquire into whether the statute should be given preemptive effect. *Skidmore* cites a list of factors that tend to make any official interpretation of a text more or less persuasive, such as the "thoroughness evident in its consideration," the "validity of its reasoning," whether it is consistent with earlier and later pronouncements on the subject, the expertise of the interpreter with respect to the subject in question, and so forth. *See Skidmore*, 323 U.S. at 139-40; *Mead*, 533 U.S. at 234-35. This does nothing to channel attention to those aspects of the preemption decision where the agency can provide the most help to the court, namely in making findings of legislative fact about the impact of diverse state standards on the functioning of the agency and on the industry the agency is charged with regulating.

A better formulation of the standard of review is the one implicitly applied in the Court's decisions that touch on this subject from *Medtronic* to the present, which we take the liberty of calling the "*Medtronic* standard." This allows the court to exercise independent judgment in determining the preemptive effect of a statute, while giving appropriate weight to the view of the relevant administrative agency on questions of legislative fact that bear on the preemption decision.

Thus, in *Medtronic*, the Court considered the effect of an express preemption clause in the Medical

Device Amendments to the Food, Drug, and Cosmetic Act. The Court independently interpreted the ambiguities in the statute bearing on the preemption decision. *See Medtronic*, 518 U.S. at 486-91. Only after extensive consideration of these issues did the Court turn to the Food and Drug Administration's views. The Court cited a number of factors that caused it to give those views weight, including the fact that the agency was uniquely qualified to assess whether a particular form of state law would stand as an obstacle to achieving the objectives of the federal statute. *Id.* at 496. But the Court did not apply either the *Chevron* or the *Skidmore* framework. Instead, it said only that its conclusion was "substantially informed" by the FDA's view about preemption. *Id.* at 495.

Similarly, in *Geier*, the Court held that preemption of state tort liability was required to avoid frustrating a regulation promulgated by the National Highway Traffic Safety Administration calling for a phase-in of passive restraint systems. The Court was careful, however, not to suggest that deference was required based either on the delegation of power to the agency or the agency's general expertise in matters of auto safety regulation. Instead, the Court concluded only that the agency's views about the impact of state tort law on its regulation were entitled to "some weight" in the circumstances of that controversy. 529 U.S. at 883. In particular, the Court noted that the agency was uniquely qualified "to comprehend the likely impact of state requirements." *Id*.

More recently, in *Watters v. Wachovia Bank, N.A.*, 127 S. Ct. 1559 (2007), the Court reviewed a lower-court judgment that relied on *Chevron* in hold-

ing state authority over operating subsidiaries of national banks preempted. The majority found no need to reach the question whether *Chevron* or any other standard of deference was appropriate, since in the majority's view preemption was compelled by the National Bank Act itself. The dissenting opinion did consider what weight should be given to agency views about preemption. *See id.* at 1582-86 (Stevens, J., joined by Roberts, C.J. and Scalia, J.). The dissenters acknowledged that "expert agency opinions as to which state laws conflict with a federal statute may be entitled to 'some weight,' especially when 'the subject matter is technical' and 'the relevant history and background are complex and extensive.'" *Id.* at 1584 (quoting *Geier*, 529 U.S. at 883). But the dissenters expressly rejected *Chevron* deference, noting that this would too "easily disrupt the federal-state balance," that agencies are not well designed to represent the interests of States, and that agencies are unlikely to show sufficient respect for state sovereignty. *Id.* The majority did not take issue with this analysis, noting only that the question was "academic" given its conclusion that preemption was required by the statute itself. *Id.* at 1572.

The Court returned to the issue of agency views about preemption in *Riegel v. Medtronic, Inc.*, 128 S.Ct. 999 (2008). As in *Watters*, the Court agreed with the agency that preemption was warranted, but as in *Watters*, the Court "found it unnecessary to rely upon that agency view" because "the statute itself speaks clearly to the point at issue." *Id.* at 1009. A dissenting opinion briefly discussed the agency's recently-adopted view favoring preemption. *See id.* at 1016 n.8 (Ginsburg, J. dissenting). The dissent noted that this view had been advanced only in an *amicus* brief and, as such, was entitled to "at most" the defe-

rence afforded under *Skidmore*. Because the agency had changed its position, the dissent thought that view was entitled to little weight. The majority responded that *if* the agency view were relevant, "mere *Skidmore* deference would seemingly be at issue." *Id.* at 1009. Like the dissent, the majority agreed that, in that hypothetical event, only "reduced" deference would be owed the agency given its change in position. *Id.*

Most recently, in *Wyeth v. Levine*, No. 06-1249, slip op. (March 4, 2009), the Court again addressed the role of agency determinations in preemption cases. The Court observed that the Food and Drug Administration, in that matter before it, had not acted with the force of law, but had merely asserted in the preamble to a regulation and in an *amicus* brief filed by the Solicitor General on behalf of the agency "that state law is an obstacle to achieving its statutory objectives." *Id.* at 19. Moreover, Congress had not "authorized the FDA to pre-empt state law directly." *Id.* Under these circumstances, the Court concluded, it was not proper to defer to "an agency's *conclusion* that state law is pre-empted." *Id.* at 20. The agency's views were entitled to "some weight," *id.* (quoting *Geier*, 529 U.S. at 883), given its understanding of the statute and its "ability to make informed determinations about how state requirements may pose an 'obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *id.* (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). But the weight given those views "depends on [the agency's] thoroughness, consistency, and persuasiveness." *Id.* In light of the procedural irregularities in the agency's development of its position, and the inconsistency with which that position had been maintained over time, the Court concluded

that the agency's views did not merit any deference. *Id.* at 20-21. This thorough consideration of the issue confirms that the Court has embraced the "*Medtronic* standard" for assessing agency determinations of preemption, at least in circumstances where Congress has not expressly delegated authority to the agency to preempt.

D. All Predicate Legal Determinations Must be Assessed under the Appropriate Standard.

A final and critical point is relevant here. When an agency seeks judicial deference for its determination that state law is preempted, *all* agency interpretations of federal law that serve as a predicate to the determination of preemption should be reviewed under the appropriate standard (which we believe should ordinarily be the *Medtronic* standard). As previously noted, preemption decisions entail two interrelated inquiries: first, the meaning of federal law; second, whether any tension between federal and state law requires the displacement of state law. If the agency seeks deference for its interpretation of federal law and no issue about displacement of state law is presented, then there is no reason why *Chevron* should not supply the relevant standard (provided the other preconditions for *Chevron* deference are met). *See Smiley*, 517 U.S. at 735. But if the agency asks the court to defer to its judgment that preemption is required, all steps in the chain of logic that lead to this conclusion should be reviewed under *Medtronic*. Any other approach would lead to ready evasion of the limits on agency authority to preempt.

In this case, for example, the OCC has justified its preemption regulation in part as an interpretation of the phrase "visitorial authority," and in part

as an interpretation of the phrase "courts of justice." Since these terms appear in a provision of the National Bank Act giving the OCC exclusive visitorial authority over national banks, *see* 12 U.S.C. § 484, either a broad interpretation of "visitorial authority" or a narrow interpretation of "courts of justice" (or both) leads to the conclusion that state enforcement of state law is preempted, because it is a type of visitorial authority given exclusively to the OCC. Consequently, affording *Chevron* deference to the OCC on the "meaning" of the critical terms will likely foreordain the outcome of the preemption inquiry. In order to preserve the proper allocation of institutional roles, all predicate legal determinations that lead to a finding of preemption must be reviewed independently under the *Medtronic* standard.

IV. THE OCC IS ENTITLED TO NO DEFERENCE FOR ITS PREEMPTION DETERMINATION.

Under the foregoing principles and the suggested standard of review, the OCC is entitled to no deference for its determination of preemption set forth in 12 C.F.R. § 7.4000.

A. The OCC Is Not Eligible for *Chevron* Deference.

There is nothing in the National Bank Act to suggest that Congress has delegated authority to the OCC to make binding determinations of preemption on its own authority. Congress has granted general rulemaking authority to the OCC in 12 U.S.C. § 93a, which gives the Comptroller authority "to prescribe rules and regulations to carry out the responsibilities of the office." This provision, which was adopted in 1980, *see* Pub. L. No. 96-221, Title VII § 708, 94 Stat.

188, does not unambiguously confer authority on the OCC to issue legislative regulations, the only type that can be said to have preemptive effect.[8] Arguably, congressional intent to authorize legislative rules under §93a may be inferred from a subsequent amendment, adopted in 1994, which authorizes the Comptroller, "act[ing] in the Comptroller's own name and through the Comptroller's own attorneys [to] enforce[e] any provisions of this title [or] *regulations thereunder*." 12 U.S.C. § 93(d) (emphasis supplied). *See* Pub. L. No. 103-325, § 331(b)(3). Express congressional authority "to enforce" regulations has often been regarded as a signal of intent of authorize an agency to make legislative rules.[9]

Even assuming §93a authorizes legislative rules, however, it nowhere expressly authorizes legislative rules that preempt state law. The power to declare state law preempted is not mentioned, either explicitly or by clear implication. If §93a suffices to delegate authority to agencies to make binding determinations of preemption, then every federal administrative agency with a general grant of authority to make rules and regulations would be empowered to make binding determinations of preemption.

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[8] *Cf. Chrysler Corp. v. Brown,* 441 U.S. 281, 310 (1979) (holding that 5 U.S.C. § 301, which confers authority on the heads of executive departments to prescribe regulations for the "government of his department," does not confer authority to make legislative rules); *Interstate Commerce Comm'n v. Cincinnati*, 167 U.S. 479, 494-95 (1897) (holding that agency cannot be given legislative rulemaking authority by implication, only by express grant).

[9] *See* Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 Harv. L. Rev. 467, 493-526 (2002).

Nor does 12 U.S.C. § 43, requiring that federal banking agencies follow specific procedures "[b]efore issuing any opinion letter or interpretative rule" dealing with preemption, constitute a grant of such authority. Section 43 nowhere confers any authority to make preemption decisions. It imposes a *limitation* on any preexisting agency authority with regard to preemption, requiring procedures beyond those set forth in the APA for issuing opinion letters or interpretative rules. *See* 5 U.S.C. § 553(b) (exempting interpretative rules and general statements of policy from notice and comment requirements). This is confirmed by the Conference Report, which states that the new procedures are "not intended to confer upon the agency any new authority to preempt or to determine preemptive Congressional intent, or to change the substantive theories of pre-emption, as set forth in existing law." H.R. Rep. No. 103-651, *as reprinted in* 1994 U.S.C.C.A.N. 2068, 2076.

If anything, §43 appears to underscore congressional understanding that any agency view about preemption would be advisory only. "Opinion letters" and "interpretative rules" are nonbinding forms of agency action, offering only advice to the regulated community about an agency's understanding of the law's requirements. *See, e.g.*, 1 Richard J. Pierce, Jr., Administrative Law Treatise § 6.4 (4th ed. 2002). They do not have the force of law, and hence are not eligible for *Chevron* deference. *See Mead*, 533 U.S. at 234; *Christensen*, 529 U.S. at 587. As previously noted, Congress occasionally delegates authority to agencies to make determinations of preemption that have the force of law. But when it does so, it conveys such authority in unmistakable language. Section 43 falls well short of such an unambiguous grant.

B. The OCC is Entitled to No Deference Under the *Medtronic* Standard.

Nor does the OCC's preemption determination merit any deference under the *Medtronic* standard. The OCC's explanation for its preemption rule (*see* 69 Fed. Reg. 1895, 1895-1900 (Jan. 13, 2004)) reads like a legal brief. It was characterized by the court of appeals as a "cursory analysis," "lacking any real intellectual rigor or depth." Pet. App. 26a. It offers no findings of legislative fact about the impact on national banks of allowing state enforcements agencies to enforce nonpreempted state law. Nor does it offer any analysis of the impact of continued state enforcement on its own visitorial functions. As the court of appeals observed, "the OCC does not appear to have found any facts at all in promulgating its visitorial powers regulations." Pet. App. 25a. The OCC has provided this Court with no reason for deferring to its preemption analysis that would not be equally applicable to the analysis of preemption by a federal district court or contained in a legal brief filed on behalf of the OCC.

Under these circumstances, the Court should exercise independent judgment in deciding the preemption question, without deferring in any respect to the views of the agency.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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